STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 17 of the Environmental Conservation Law and Part 612 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by:

RULING OF THE ADMINISTRATIVE LAW JUDGE

DAVE LANDAU,

Respondent. (Case No. 2-253707)

Summary

By written motion dated July 7, 2004, Staff of the Department of Environmental Conservation (Department Staff) requests that a default judgment be issued against Dave Landau and Midwood Estates, pursuant to Section 622.15 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR 622.15). Staff maintains that Dave Landau and Midwood Estates defaulted in this matter by failing to file a timely answer to Staff's complaint, and by failing to appear at a pre-hearing conference that was announced in Staff's notice of hearing.

Staff's motion cannot be granted as to either Dave Landau or Midwood Estates. As further explained below, the motion cannot be granted as to Dave Landau because Staff has not adequately demonstrated that he was served with the notice of hearing and complaint. Furthermore, the motion cannot be granted as to Midwood Estates because it was not named as a respondent in the notice of hearing and complaint.

Even if the motion could be granted, Staff's proposed order would have to be modified because, as drafted, it would require the submission of a completed application to register a petroleum bulk storage facility that Staff now acknowledges is currently registered with the Department.

Background

Department Staff initiated this action by a notice of hearing and complaint dated May 4, 2004. The complaint alleged that the Respondent, Dave Landau, failed to timely register his petroleum bulk storage facility located at 414 Avenue N, Brooklyn. This was alleged as a violation of 6 NYCRR 612.2, for which Department Staff sought payment of a Seven Thousand Five Hundred Dollar ($7,500) civil penalty and such other relief that the Commissioner should deem just and appropriate.

The hearing notice indicated that pursuant to 6 NYCRR 622.4, the Respondent was required, within 20 days of receiving the

notice and complaint, to serve upon Department Staff an answer signed by the Respondent, the Respondent's attorney, or other authorized representative. The notice also advised the Respondent that, pursuant to 6 NYCRR 622.8, a pre-hearing conference would be held at 11 a.m. on May 20, 2004, at the Department's offices in Long Island City, in order for the Respondent and Department Staff to resolve, clarify and define the issues between them. Finally, the notice informed the Respondent that his failure to make timely service of an answer, or his failure to attend the scheduled pre-hearing conference, would result in a default and waiver of the Respondent's right to a hearing.

By written motion dated July 7, 2004, Department Staff requested a default judgment pursuant to 6 NYCRR 622.15. The default judgment is sought as to Dave Landau and Midwood Estates, which the motion papers cite together as "Respondent," even though Midwood Estates was not a named respondent in the notice and complaint. According to the default motion, Dave Landau and Midwood Estates are in default because they failed to file a timely answer and because they failed to appear at the scheduled pre-hearing conference. The motion requests that the Commissioner issue an order finding the default, imposing a $7,500 civil penalty, requiring that a completed application to register the petroleum bulk storage facility be submitted within 30 days of the order's effective date, and directing that there be no further violations of the law and regulations.

As an administrative law judge with the Department's Office of Hearings and Mediation Services, I was assigned to this matter after the office received a copy of the default motion. After reviewing it, I wrote Staff counsel Benjamin Conlon a letter dated August 12, 2004, seeking clarification of Staff's position.

My letter noted that while Staff's proposed order would require the Respondent to submit a completed application to register the petroleum bulk storage facility, the cover letter for the hearing notice states that according to the Department's records, the Respondent registered his tanks after they were due to be registered, which suggests that the Respondent complies with the registration requirement and need not re-register at this time.

My letter also noted that Mr. Conlon's affirmation in support of the default motion justifies the proposed civil penalty in part on the "duration" of the violation of the registration requirement. Staff's proposed order (but not the complaint) said that the registration for the Respondent's facility expired on July 14, 2002. However, it was unclear from the papers as a whole if and when the violation was corrected.

I wrote that because Staff's papers were so ambiguous, the default motion could not be granted and the appropriate relief awarded until Staff clarified whether the Respondent had come back into compliance with the registration requirement. I wrote that if the Respondent had come back into compliance, I needed to know when the registration was renewed, so the duration of the violation could be determined.

Finally, pointing out that if the Respondent's facility is currently registered, it would not seem necessary to require the Respondent to submit a new registration application, I sought confirmation whether Staff wanted to withdraw that requirement from its proposed order.

In response to my letter, Alyce Gilbert of the Department's Division of Environmental Enforcement, who works under Mr. Conlon's supervision, submitted an affidavit dated August 24, 2004. Her affidavit indicated that the facility's petroleum bulk storage registration expired on July 14, 2002, and that the facility remained unregistered until January 21, 2004, when it was registered again.

In a follow-up conversation with Ms. Gilbert on August 31, 2004, she said that because the facility is currently registered, Staff agreed to withdraw its request that the Respondent be directed to submit a new registration application.

No response to the default motion has been made by or on behalf of Dave Landau or Midwood Estates.

- - Dave Landau

The default motion cannot be granted as to Dave Landau because Staff has not adequately demonstrated that he was served with the notice of hearing and complaint.

As noted above, Dave Landau was the only named respondent in the notice of hearing and complaint. In an affidavit of September 1, 2004, Ms. Gilbert states that on May 7, 2004, she placed a true and correct copy of the documents in a secure postpaid wrapper, addressed as follows:

Dave Landau
Midwood Estates
1225 39th Street
Brooklyn, New York 11218

(This affidavit was furnished in response to my August 12, 2004, letter, to correct a typographical error in Ms. Gilbert's

mailing affidavit that was attached as Exhibit "C" to the default motion.)

According to Ms. Gilbert, she mailed the notice of hearing by certified mail return receipt requested. A copy of the signed return receipt card, attached to the motion as Exhibit "D", shows the following address for delivery:

Midwood Estates
Dave Landau
1225 39th Street
Brooklyn, New York 11218

When the card was returned to Department Staff, it indicated a mailing date of May 10, 2004, and a delivery date of May 12, 2004. The name of the recipient is not decipherable from that person's signature on the card. The last name "Ausch" is printed below the signature line, but that name does not appear anywhere in Staff's papers.

According to the Department's regulations, a notice of hearing and complaint may be served by certified mail, in which case service is considered complete when the notice of hearing and complaint are received [see 6 NYCRR 622.3(a)(3)]. In this case, the papers were received, but it is not evident that they were received by or on behalf Mr. Landau.

The return receipt card, by itself, assures the Department only that the papers were delivered at the address to which they were sent, not that the address is an appropriate one for service upon their intended recipient. Also, the card identifies two addressees, with Midwood Estates appearing at the top.

Whatever legal relationship Midwood Estates has to Mr. Landau is not explained in Mr. Conlon's affirmation, Ms. Gilbert's affidavit, or any other evidence provided as part of the default motion. Nor is there any evidence connecting Mr. Landau to the 1225 39th Street address.

Department Staff did not do separate mailings for Mr. Landau and Midwood Estates; it mailed one set of documents for two intended recipients. Though the notice of hearing and complaint were delivered at the Brooklyn address, it is not clear on whose behalf they were accepted, or to which of the addressees they were forwarded.

In summary, Staff's default motion is inadequate as to Dave Landau because it does not contain proof that Mr. Landau was served with the notice and complaint, a required element for such a motion. [See 6 NYCRR 622.15(b)(1), which states that a motion

for a default judgment must contain proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding.]

- - Midwood Estates

The default judgment cannot be granted as to Midwood Estates because Midwood Estates was not named as a Respondent in the notice of hearing and complaint, even if one were to conclude that it, and not Dave Landau, was served with the pleadings.

Because the notice of hearing and complaint identified only Mr. Landau as Respondent, he alone was obliged to answer the complaint and appear at the pre-hearing conference. The failure of Midwood Estates to answer or appear does not constitute a default, because Staff's hearing notice put it under no obligation to respond to the charges. If Staff wants to add Midwood Estates to this action, it should move to amend the complaint.

- - Duty to Register

Finally, even if one could find the basis for a default in this matter, Staff's proposed order would have to be modified. Where, as here, Staff now concedes that the petroleum bulk storage facility has been re-registered with the Department, it makes no sense to require the submission of another registration application.

Ruling

The motion for default judgment is denied as to both Dave Landau and Midwood Estates.

/s/
Albany, New York Edward Buhrmaster
September 21, 2004 Administrative Law Judge

TO: Benjamin A. Conlon, Esq.
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